STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2014
v	No. 317368 Wayne Circuit Court
STEPHEN ROBERT YOUNG, Defendant-Appellant.	LC No. 12-011375-FH

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his waiver trial convictions of felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony ("felony-firearm"), third or subsequent conviction, MCL 750.227b. Defendant was sentenced to two months' probation for the felon in possession of a firearm and felonious assault convictions, and 10 years' imprisonment for the felony-firearm conviction. We affirm.

I. RECANTING TESTIMONY

Defendant first contends that the trial court erred in admitting the testimony of Joshua Santti and Jamie Santti (collectively "complainants") because their previous statement recanting the allegations they made to the police should "cancel out" all versions of their statement. We disagree.

In order to preserve an evidentiary issue, the opposing party must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant never objected to the admission of evidence regarding complainants' prior statements, nor did defendant object to complainants' testimony at trial regarding the events on the night in question. Therefore, this issue is unpreserved for appeal.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); see also MCR 6.201(A), (J) (stating same). Questions of law are reviewed by this Court de novo. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). However, because this issue is

unpreserved, our review is for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

On appeal, defendant contends that, because complainants signed pretrial statements recanting their prior statements to police, all versions of their statements must be cancelled out. In support of this argument, defendant relies on civil rules regarding summary disposition, and argues that these rules should be extended to criminal contexts.

Defendant is correct that in civil cases a witness is bound by their prior testimony and "that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). However, this rule does not apply "to prevent a party from contradicting statements that were not made under oath or as part of legal proceedings." *Shelby Charter Twp v Papesh*, 267 Mich App 92, 103; 704 NW2d 92 (2005).

Initially, we note that this defendant has provided no compelling support for his contention that this Court should extend civil rules to the criminal law context. "[W]e are an error-correcting court. As such, we must confine our role to that function. Were we inclined to effect a significant change to Michigan law, . . . 'prudence would counsel against it because such a significant departure from Michigan law should only come from our Supreme Court [or the Legislature], not an intermediate appellate court.' " *People v Woolfolk*, 304 Mich App 450, 475; 848 NW2d 169 (2014) (internal citation omitted; alteration in original). Thus, such a significant departure in the law is not the type of determination that should be made by this Court.

Second, even if this Court were to extend the civil rule as defendant wishes, it would not affect the instant case. As noted above, "testimony cannot be contradicted by affidavit in an attempt to defeat *a motion for summary disposition*." *Casey*, 273 Mich App at 396 (emphasis added). The civil rule only applies at the summary disposition stage, not at trial. In fact, even in civil cases a witness may testify inconsistent with his or her prior testimony. See *Barnett v Hidalgo*, 478 Mich 151, 164-166; 732 NW2d 472 (2007) (applying MRE 613 "prior inconsistent statement" impeachment to a civil suit). The witness's prior inconsistent statement simply may be used against him or her to impeach the witness's testimony. *Id.* Therefore, even adopting defendant's proposed extension of the civil law, complainants could still testify without their prior inconsistent statements being "cancelled out."

Here, the trial court properly admitted complainants' testimony at trial and allowed defense counsel to cross-examine both witnesses on their prior statements exculpating defendant. Such a prior inconsistent statement "may be used in some circumstances to impeach credibility." *People v Stanaway*, 446 Mich 643, 692; 521 NW2d 557 (1994). However, the trial judge found complainants credible and did not find defendant's witnesses credible, despite the impeachment of complainants' testimony with the prior inconsistent statements. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). On this basis, defendant is unable to show plain error affecting substantial rights.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that his trial counsel was ineffective because he failed to properly investigate the case. We disagree.

A timely motion for a new trial, raising the issue of ineffective assistance of counsel, is sufficient to preserve the issue for appellate review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Alternatively, a criminal defendant may request a *Ginther* hearing, to make a separate factual record supporting the claim of ineffective assistance of counsel, to preserve the issue for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant never filed a motion for new trial with the trial court, nor did he move for a *Ginther* hearing in the trial court. Defendant did file a motion to remand for a *Ginther* hearing with this Court on January 23, 2014. This Court denied defendant's motion to remand on March 28, 2014.[1] Therefore, this issue is unpreserved.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error and the questions of constitutional law are reviewed de novo. *Id.* Because this issue is unpreserved, this Court's review is limited to mistakes apparent on the appellate record. *People v Crews*, 299 Mich App 381, 400; 829 NW2d 898 (2013).

The right to counsel during a criminal trial is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right is not merely to any assistance of counsel, but to effective assistance of counsel. *US v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). This right is substantive in nature, and concentrates on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

Effective assistance of counsel is presumed and the challenging defendant bears the heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). In order to show ineffectiveness of counsel, a defendant generally must show that: (1) counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's errors, the results of the proceedings would be different; and (3) the result that did occur was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

This Court will not substitute its judgment for that of trial counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defense counsel has wide discretion as to matters of trial strategy. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). In the past, this Court has held that decisions regarding what evidence to present, *People v Dixon*, 263

[1] See *People v Young*, unpublished order of the Court of Appeals, entered March 28, 2014 (Docket No. 317368).

Mich App 393, 398; 688 NW2d 308 (2004), and whether to call or question witnesses, *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012), are presumed to be matters of trial strategy. The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Payne*, 285 Mich App at 190. A strategy that does not work is not ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

The failure to reasonably investigate the case can constitute ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 51-55; 826 NW2d 136 (2012). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation, and the failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Defendant claims that defense counsel was constitutionally ineffective because he only visited defendant two times while defendant was incarcerated, refused to file pretrial motions challenging witness statements, refused to interview witnesses, and otherwise failed to investigate the case. However, this Court's review is limited to the record, *Crews*, 299 Mich App at 400, and the record is devoid of any of defense counsel's investigative failings. Defendant's argument on appeal is that defense counsel's failure to properly investigate the case kept him from questioning Tiffany Groves, one of defendant's girlfriends, about a police interaction, calling Jimmy Rapp, another individual present during the shooting, as a witness, or introducing evidence of Jamie Santti's intoxication and complainants' motives to lie about defendant. As noted above, the decision whether to call or question witnesses is clearly within the purview of defense counsel's decisions on trial strategy, *Russell*, 297 Mich App at 716, and therefore, defense counsel could have determined not to question Groves on the alleged police interaction or call Rapp as a witness as a matter of strategy. Also, there is no indication in the record that Rapp would have testified in accord with what defendant claimed at trial, and even if he had, Rapp's testimony would have been cumulative considering the testimony of the four defense witnesses already presented. Also, defense counsel *did* cross-examine both complainants on their levels of intoxication on the night in question, and their respective dislike for defendant prior to the night in question. Therefore, defendant has provided no evidence that defense counsel failed to reasonably investigate the case, *Trakhtenberg*, 493 Mich at 51-55, or that defense counsel's performance failed to meet an objective standard of reasonableness under prevailing professional norms, *Lockett*, 295 Mich App at 187.

Second, defendant has failed to establish any prejudice arising from defense counsel's performance. *Id*. Defense counsel adequately questioned complainants on their intoxication, dislike for, i.e., bias against, defendant, and their signed statements exculpating defendant. These tactics furthered the defense theory of the case that complainants were framing defendant. Defense counsel offered the testimony of Groves, Lauren James, another individual present during the shooting, and defendant himself, all stating that defendant never had a gun on the night in question. However, the trial court found the defense witnesses incredible and believed complainants' recounting of events. Simply because defense counsel's theory and strategy at trial did not work, does not render his performance ineffective. *Petri*, 279 Mich App at 412. The prosecution provided sufficient testimony to prove that defendant pointed a handgun at Jamie before firing a single bullet over her head, thus supporting all three convictions. Even if defense

counsel's conduct fell below an objective standard of reasonableness, defendant has provided no evidence that, but for counsel's errors, the results of the proceedings would be different. *Lockett*, 295 Mich App at 187.

III. MOTION TO AMEND THE WITNESS LIST

Finally, defendant contends that the trial court abused its discretion in denying defendant's motion to amend the witness list in order to call defendant's mother, Barbara Muelrath, to testify at trial. We disagree.

Again, "[a] trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Burns*, 494 Mich at 110; see also MCR 6.201(A), (J) (stating same). Preliminary questions of law, such as whether a rule of evidence or court rule preclude the admission of evidence, are reviewed de novo. *Id*. Likewise, a trial court's decision whether to permit the late endorsement of a witness is also reviewed for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes. *People v McDonald*, 303 Mich App 424, 434; 844 NW2d 168 (2013). Although the trial court has discretion to permit or deny the late endorsement of a witness, preclusion of a witness is an extreme sanction "and should be limited to only the most egregious cases." *Yost*, 278 Mich App at 379.

Generally, all relevant evidence is admissible except as otherwise provided by either the state or federal constitutions or by rule of evidence. MRE 402; *Yost*, 278 Mich App at 355. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403; see also *Yost*, 278 Mich App at 407.

MRE 608(b) "generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters." *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). Impeachment evidence is not collateral if it relates to the substantive issues in the case or "matters closely bearing on a defendant's guilt or innocence," *LeBlanc*, 465 Mich at 590, matters related to a witness's bias or interest, or to matters related to "any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true," *People v Rosen*, 136 Mich App 745, 759; 358 NW2d 584 (1984). A collateral matter is defined as "[a]ny matter on which evidence could not have been introduced for a relevant purpose." *Steele*, 283 Mich App at 488, quoting *Black's Law Dictionary* (8th ed). "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." MRE 613(b). Extrinsic evidence of a prior inconsistent statement may be used to impeach a witness when the witness claims to not remember making the statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). However, the extrinsic evidence should not be used as substantive evidence. *Id*.

At trial, complainants both testified that they signed the typewritten statements provided by Muelrath "[t]o get her out of [their] house," "[t]o stop . . . the phone calls trying to get [them] to change [their] statements," and because they "didn't know what else to do." Complainants admitted that Muelrath did not intimidate, threaten, or force them to sign, but they decided to sign the statements in order to appease Muelrath and get some peace. When asked to provide an offer of proof regarding Muelrath's testimony, in order to rule on defendant's motion to amend the witness list to include her, defense counsel stated that she would testify that complainants never told her that they were signing the statements just to get Muelrath "out of their hair."

The trial court did not abuse its discretion in denying defendant's motion to amend the witness list and call Muelrath as an impeachment witness. It is not relevant whether complainants ever told Muelrath they were only signing the typewritten documents to get Muelrath to leave them alone. Complainants never testified that they *told* Muelrath they signed the statements in order to get her to leave, so any testimony by Muelrath on that point would not truly be impeaching testimony; it would not contest anything to which complainants testified. The mere existence of the signed statements was sufficient to impeach their testimony as prior inconsistent statements, and defense counsel was able to question both witnesses on the inconsistencies. MRE 613(b). Because complainants both admitted that they signed the typewritten statements, testimony regarding whether they expressly told Muelrath the reason for signing the statement was collateral. Therefore, the trial court did not abuse its discretion in denying defendant's motion to amend the witness list.

Additionally, even if the trial court did abuse its discretion by denying defendant's motion to amend the witness list, the result was harmless error. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 769.26 "creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). Defendant has provided no basis for this Court to find that Muelrath's testimony would have affected the outcome of the proceedings. Defendant's theory at trial was that complainants were lying in order to get him in trouble, and this theory was adequately supported by defense counsel's cross-examination regarding their prior inconsistent statements, as well as the four defense witnesses that testified regarding either defendant's lack of a handgun on the night in question, or complainants'

motivations to lie about defendant. Therefore, defendant has not proven that the exclusion of Muelrath's testimony "resulted in a miscarriage of justice." *Id.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood